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Article abstract

Aux États-Unis comme au Canada il y a toujours eu, et il continue à y avoir, des problèmes à propos du rôle de l'État dans le domaine de l'éducation confessionnelle. Au Canada, l'article 93 de l'*Acte de l'Amérique du Nord britannique* protège les droits confessionnels des catholiques et des protestants. Aux États-Unis, le premier amendement à la Constitution ordonne une séparation entre l'Église et l'État. Il y a également L'*Establishment Clause* qui défend que l'État subventionne les écoles confessionnelles.

Dans cet article, l'auteur retrace l'interprétation donnée à l'article 93 de l'Acte de l'*Amérique du Nord britannique* ainsi que l'interprétation donnée à l'*Establishment Clause* du premier amendement de la Constitution américaine, et fait des comparaisons entre les deux. En conclusion, il constate que même les juges les plus savants ne pourront peut-être jamais trouver la solution définitive aux problèmes qui se posent.

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Church, State, and Education in Canada and the United States: A Study in Comparative Constitutional Law

Edward G. HUDON*

Aux États-Unis comme au Canada il y a toujours eu, et il continue à y avoir, des problèmes à propos du rôle de l'État dans le domaine de l'éducation confessionnelle. Au Canada, l'article 93 de l'Acte de l'Amérique du Nord britannique *protège les droits confessionnels des catholiques et des protestants. Aux États-Unis, le premier amendement à la Constitution ordonne une séparation entre l'Église et l'État. Il y a également l'*Establishment Clause *qui défend que l'État subventionne les écoles confessionnelles.*

*Dans cet article, l'auteur retrace l'interprétation donnée à l'article 93 de l'*Acte de l'Amérique du Nord britannique *ainsi que l'interprétation donnée à l'*Establishment Clause *du premier amendement de la Constitution américaine, et fait des comparaisons entre les deux. En conclusion, il constate que même les juges les plus savants ne pourront peut-être jamais trouver la solution définitive aux problèmes qui se posent.*

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Introduction

Both Canada and the United States have had repeated separation of church and state problems with respect to education. In Canada the problems stem from the fact that publicly supported sectarian schools are not only allowed to exist, but are in fact protected by Article 93 of the *British North America Act* which, although each Province is given the exclusive power to make laws in relation to education, nevertheless provides:

> (1) Nothing in any such Law [enacted by a provincial legislature] shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;
>
> (2) All of the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec.

In the United States the situation is different. There, sectarian denominational schools also exist. Indeed, their right to exist was upheld by the Supreme Court of the United States in *Pierce v. Society of Sisters*, decided in 1925 [1]. However, that is where any similarity between Canada and the United States with respect to sectarian education ends because of the First Amendment to the Constitution of the United States which provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Amendment has been interpreted to mean that there is a "wall of separation" between church and state that prevents the use of public funds for the support of sectarian education [2]. But though the situation in the United States with respect to denominational schools is different from that which exists in Canada, in neither country do the problems presented lack intensity.

1. 268 U.S. 510 (1925).
2. *Everson v. Board of Education*, 330 U.S. 1 (1947).

1. The Canadian Church and State School Controversies: A Resume

1.1. The Manitoba School Question

In the past, in Canada the controversies that have arisen have generally been the result of instances in which a Province, or a lesser political subdivision, has tried to interfere with the "constitutional sanctity" given government supported sectarian schools by the *British North America Act*[3]. Certainly, the Manitoba school question is the most celebrated of these controversies. It arose in 1890 when the Province enacted a law which abolished the protection given sectarian schools by the 1870 *Manitoba Act*[4], and replaced it with a non-sectarian school system[5]. That controversy was so bitter that it even caused the fall of the Canadian Government that tried to resolve the question by the issuance of a remedial order following an appeal to the Governor-General in Council as provided for by the *British North America Act* when a Province refuses to budge, and after that Government sought the enactment of a Remedial Act when the Manitoba Legislature refused to comply with the Remedial Order[6]. The matter was resolved by the Laurier-Greenway settlement, a compromise entered into between Provincial officials and the new Liberal Government of Canada headed by Sir Wilfrid Laurier[7].

1.2. The Ontario Secondary Education Dispute

There have been other church-state school controversies in Canada that are as notable as the Manitoba School Question, but none has been as bitter. Thus, there was the Ontario secondary education dispute that was settled in *Roman Catholic Separate School Trustees for Tiny v. The King*[8]. In this

3. See D.A. SCHMEISER, *Civil Liberties in Canada*, London, Oxford University Press, 1964, Chap. IV, "Denominational Education."
4. *The Manitoba Act*, 1970, 33 Victoria, Chap. 3, confirmed by *The Imperial Act*, 34-35 Victoria, c. 28.
5. *An Act Respecting Public Schools*, 53 Victoria, chap. 38; *An Act Respecting the Department of Education*, 53 Victoria, chap. 37. See *Barrett v. City of Winnipeg*, [1890] 7 Manitoba Reports 273, [1891] 19 Canada Supreme Court Reports 374, [1892] A.C. 445; *Brophy v. Attorney General of Manitoba*, [1895] A.C. 202.
6. See Peter B. WAITE, *Canada, 1874-1896*, Toronto/Montreal, McClelland and Stewart, 1971. Chap. 13, "The Fall of the Conservative Government, 1895-1896"; Lovell Clark, *The Manitoba School Question: Majority Rule or Minority Rights?*, Toronto, Cop Clark Publishing co., 1968.
7. See Oscar D. SKELTON, *Life and Letters of Sir Wilfrid Laurier*, v. 2, New York, The Century Co., 1922.
8. The citations to the case as it traveled through the courts are as follows: 59 Ontario Law Reports 96, 60 Ontario Law Reports 15, [1927] Canada Supreme Court Reports 637, [1928] A.C. 363.

controversy the Trustees of the Roman Catholic separate schools objected to a 1915 regulation that deprived them of the right to establish and maintain courses beyond Form V, deprived them of public support for separate schools beyond that Form, and deprived them of the right to be exempt from taxation for the support of schools beyond that Form not conducted by their own Board of Trustees. Actually, the controversy centered around an 1871 Act to improve the common and grammar schools of the Province of Ontario which made Public Schools out of what had been Common Schools, and High Schools out of what had been Grammar Schools [9]. The Act did not mention Separate Schools and it was because of this that the 1915 Regulation, which was upheld by the Privy Council in *Tiny*, could prevent Catholic separate schools from giving instruction at the high school level, even though they had been doing it since Confederation.

Then in Ontario there is *Trustees of the Roman Catholic Separate Schools of the City of Ottawa v. Mackell*, decided in 1917 [10], a case in which it was held that the protection given separate schools by the *British North America Act* conferred a right or privilege "determined according to religious belief, and not according to race or language [11]."

1.3. Quebec and the School Question

In the Province of Quebec, the controversies that have arisen in the past have centered around who should go to which school. Thus, *Separate School Trustees v. Shannon* [12] involved the children of a mixed marriage with the father Protestant and the mother Roman Catholic. Even though the children were baptized Roman Catholics and presumably brought up as Catholics, it was held that Protestant dissentient schools had to accept as pupils the children of a dissentient ratepayer which the father was, regardless of the religious belief of the children, so long as they were of school age [13].

9. *Statutes of the Province of Ontario*, 34 Victoria, Chap. 33.
10. [1917] A.C. 62.
11. [1917] A.C. 62, 69. See also *McCarthy v. The City of Regina and Board of Trustees of the Public School* (Neida case), [1917] 1 Western Weekly Reports 1088, a Saskatchewan case in which it was held that one not of the religious faith of a minority could not exercise the right given the minority and had to be assessed for the support of the public schools. In addition see *McCarthy v. The City of Regina et al.* (Barton case), [1917] 1 Western Weekly Reports 1105, another Saskatchewan case in which it was held that the right to pay taxes to the public school instead of to the separate school was not a right or privilege reserved to the minority.
12. [1930] 4 D.L.R. 190.
13. For the decision of the lower Quebec courts, see [1929] 67 Quebec Superior Court Reports 263, and [1929] 47 Quebec King's Bench Reports 242.

Next, there was the question of Jewish children who, though neither Catholic nor Protestant, were classified as Protestants for school purposes by a 1903 Quebec law [14]. When the question of the validity of the Quebec law finally reached the Privy Council in *Hirsch v. Protestant Board of School Commissioners of Montreal* [15], it was found untenable that the word "Protestant" as it was used in the statute should be construed to include Jews. Furthermore, even though the *British North America Act* protects the rights that belonged to Roman Catholics and Protestants at the time of the Union, it was decided that it would be to give a meaning to that statute "which its words will not bear" to treat the members of these two denominations as "a class of persons" who have the right to object to the establishment of a school not under Christian control [16]. To this it was added that the Legislature of the Province could frame legislation for the establishment of separate schools for non-Christians, which is what happened.

Then there are the Jehovah's Witness cases, *Perron v. School Trustees of the Municipality of Rouyn* [17] and *Chabot v. School Commissioners of Lamorandière* [18]. In the former, the children of Jehovah's Witnesses were refused admission to a Protestant school because they were said not to qualify as Protestants [19]. In the latter, the *Chabot* case, the question was whether a non-Catholic taxpayer can demand that his children be admitted to a Catholic school, the only school in the community, without having to follow religious instruction or take part in Catholic devotions.

In the *Perron* case the Court of Appeals for the Province rejected the contention that, though former Catholics, the Perrons could not be recognized as Protestants because they now belonged to a sect that was not only separate and distinct from Catholicism, Protestantism, and Judaism, but was opposed to all religions as well. Instead, the Court held that to be a Protestant it was sufficient if one had repudiated the authority of the Pope which the Perrons had done. Their children were ordered admitted to the Protestant dissident school. In the *Chabot* case, natural law was cited as authority from which "it is necessary to conclude that children who attend a school are not obliged to follow a religious teaching to which their father is opposed [20]." The Court ruled that the children could not be expelled from the Catholic school for not participating in religious exercises to which their father was opposed.

14. 3 Edw 7, c. 16.
15. [1928] A.C. 200.
16. *Ibid.*, pp. 203, 204.
17. [1956] 1 D.L.R. (2d) 414.
18. [1958] 12 D.L.R. (2d) 796.
19. [1956] 1 D.L.R. (2d) 414, 416.
20. See the opinion of PRATTE, J., [1958] 12 D.L.R. (2d) 796, 802.

1.4. *Notre-Dame-des-Neiges* and the Development of a Different Problem

Now, at least in the Province of Quebec, a different problem has developed with respect to the extent of the protection given sectarian schools by Section 93 of the *British North America Act*. This problem stems from the fact that in the Province of Quebec, or at least in parts of it, a radical change is taking place as the population is changing from one that in the past has been either Roman Catholic or Protestant to one that is becoming more and more pluralistic. And that has had an important impact on areas such as the *Côte-des-Neiges* part of Montreal in which a French-speaking Roman Catholic parish was organized in 1901 and which was annexed to Montreal in 1908[21].

With the passage of time, the character of the population of this area changed to the point that the latest statistics, already nine years old, indicate that the population is a mere 50.4% Catholic, with the other 49.6% being 27.7% Jewish, 13.1% Protestant, 2.7% Orthodox, and 6.1% without religious preference[22]. This had an adverse effect on the *Notre-Dame-des-Neiges* school which has been in existance since 1848. As early as 1973 the school was threatened with being closed because of the lack of students, but when the non-Catholic students were asked to stay so that the school could remain open the school population increased. However, the proportion of the non-Catholic students increased dramatically, as did the number of parents who asked that their children be exempt from Catholic religious instruction — from 26 to 36% over a period of four school years (1975-76 to 1978-79). As early as the school year 1972-73 a teacher asked to be exempt from having to give religious instruction. The outcome was a movement initiated by the parents to have the school abandon its sectarian Catholic status and have it become non-sectarian or pluralistic. The matter was brought to a head when those who opposed such a course brought suit to prevent the change[23].

Although polls taken of parents indicated that a majority of them favored the change, suit was brought against the *Comité catholique du Conseil Supérieur de l'Éducation* made up of a Catholic Bishop, Catholic priests, school administrators, and parents to prevent the change[24]. The case was heard by Chief Judge Jules Deschenes of the Quebec Superior Court

21. See Jocelyne DURAND, Guy DURAND, Lucie PROULX, Jean-Pierre PROULX, *La Déconfessionnalisation de l'école ou le cas de Notre-Dame-des-Neiges*, Montréal, Libre Expression, 1980, Chap. 1.
22. *Dame Micheline Clément-Séguin et al. v. Le Procureur Général de la Province de Québec et al.*, decided April 17, 1980, (not yet reported), Act. I.
23. For the chronology of events see opinion of Judge Jules Deschenes, Prologue and Act I.
24. For the names of all of the parties, see the caption of the case.

who rendered a decision on April 17, 1980, in which it was declared that the schools administered by the Catholic committee were, in law, sectarian and Roman Catholic, and which declared null and void the action of the Committee to change the *Notre-Dame-des-Neiges* school from sectarian to nonsectarian [25].

Judge Deschenes reasoned that the 1867 British North America Act guaranteed Roman Catholic parents in Quebec the right to sectarian schools. He decided further that schools administered by the *Commission des écoles Catholiques de Montréal* were already sectarian and Roman Catholic, and that a resolution adopted in 1974 by the Commission recognizing the *Notre-Dame-des-Neiges* school as such was inapplicable. Both that resolution and the one adopted in 1979 revoking the sectarian character of the school were declared null and void.

In his somewhat unique opinion with its prologue, acts, scenes, and epilogue, Judge Deschenes summarized the sequence of events that led to the attempt to secularize *Notre-Dame-des-Neiges* in which Bishop, priests, and laypersons participated. He also reviewed the history of education in Canada from pre-Confederation days to the present, and he touched on the conflicts that have taken place to achieve and preserve sectarian education. He stressed that the authority given the Provinces over education by the *British North America Act* is subordinate to the mandate of Article 93 of that Act that protects sectarian education [26].

Judge Deschenes recognized the difficulty that the development of a pluralistic society has produced [27], but to him the solution does not reside in the suppression of sectarian education, nor in the surrepticious introduction of non-sectarian schools in a network of sectarian education [28]. Instead, he suggested the creation of a secular school commission that would be parallel to the existing Catholic and Protestant School Commissions [29]. But even if that is the path that should be followed in the future, he noted that he had to decide the case under existing law [30]. As he applied that law he found that the action of the Catholic School Commission that secularized the *Notre-Dame-des-Neiges* school was illegal — null and void. Apparently an appeal has been filed. If so, the ultimate outcome should be as interesting as Judge Deschenes' opinion is.

25. For further identification of the case, it is no. 500-05-010917-795, District of Montreal, Province of Quebec.
26. Act 2, Scenes I and II.
27. Act 4, Scene I.
28. Act 4, Scene IV.
29. Act 4, Scene IV.
30. Épilogue.

2. The American Scene

In the United States there is not the question of who can go to which school as there is in Canada, or whether the government is living up to its obligation to support sectarian schools. Instead, the question is whether the government is doing more than it should with respect to sectarian schools because of the prohibition of the Establishment Clause of the First Amendment, and this Clause has had a colorful career, particularly since it has been applied to the States through the Fourteenth Amendment to the Constitution of the United States. Since the beginning, the purpose of the Clause has been to erect a wall of separation between church and state, but today the wall is not quite as high or as impregnable as it was only a few years ago. That is reflected in articles such as the one published early this year in the *Boston Sunday Globe* entitled, "High court admits it: Church-state issue muddy[31]." Indeed, in recent years, as decision has followed decision, the wall has seemed to become more and more a "blurred, indistinct, and variable barrier." At least, that is the way it was described in one of the opinions of the Supreme Court in *Lemon v. Kurtzman*[32].

2.1. From *Everson* to *Zorach v. Clauson*

The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Today, this Amendment, one of the first ten that constitute the Bill of Rights which went into force during December, 1791, applies not only to the relationship between church and state at the federal level in the United States, but, through the Fourteenth Amendment to the Constitution which went into force in 1868[33], it applies equally to this relationship at the level of the States of the United States. Or, as Justice Hugh Black expressed it in *Everson v. Board of Education of the Township of Ewing*, decided in 1947:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a

31. *Boston Sunday Globe*, Boston, Massachusetts, February 24, 1980, p. 41.
32. 403 U.S. 602, 614 (1971).
33. See John R. GREEN, "The Supreme Court, the Bill of Rights and the States", 97 *University of Pennsylvania Law Review*, 608 (1948-49).

> state nor the Federal government can, openly or secretly, participate in the affairs of any religious organizations or groups or *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." [34]

From this it should not be assumed that there never were established churches in the United States. At the start of the American Revolution established churches existed in nine of the American colonies, and, in spite of increased agitation for the separation of church and state from the very start of the Revolution, it was not until 1833 that disestablishment took place in Massachusetts [35]. Also, New Hampshire had an established church until 1817 and Connecticut until 1818 [36].

Moreover, in spite of the clarity of Justice Black's explanation of the meaning of the "establishment of religion" clause of the First Amendment, the interpretation of the clause and its application have not been easy or without dissent. Indeed, even in *Everson* in which the Justice gave his celebrated explanation of the clause, he wrote for a majority of a divided Court. At issue in the case was a state statute that authorized the reimbursement of parents for the expense of public bus transportation of children who attended Roman Catholic as well as public schools. The vote in the case was five to four to uphold the statute, with dissents written by Justices Jackson and Rutledge in which Justices Frankfurter and Burton joined [37]. The gist of Justice Black's majority opinion was that it could not be said that the First Amendment prohibited the State of New Jersey from spending tax raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it paid the fares of pupils attending public and other schools.

Although the vote was seven to one in *McCollum v. Board of Education of School District No. 71, Champaign County, Illinois* [38], in which the Court struck down that part of a state compulsory education law that permitted religious classes in public schools, there was anything but unanimity even among the seven who voted to strike down the law. Justice Frankfurter wrote a separate opinion in which he was joined by three other Justices [39]. In

34. 330 U.S. 1, 15, 16 (1947).
35. See William Warren SWEET, *The Story of Religions in America*, New York, Harper & Brothers, 1930, pp. 274, 275.
36. *Ibid.*, p. 275.
37. For Justice Jackson's dissent in which Justice Frankfurter joined, see 330 U.S. 1, 18; for Justice Rutledge's dissent to which Justice Frankfurter, and Justices Jackson and Burton agreed, see 330 U.S. 1, 28.
38. 333 U.S. 203 (1948).
39. Justices Jackson, Rutledge, and Burton, 333 U.S. 203, 212.

addition, Justice Jackson wrote a concurring opinion [40], and Justice Reed dissented [41].

Again, the same thing happened in the controversial school prayer decisions, *Engle v. Vitale* [42] and *Abington School District v. Schempp* [43], in which the recitation of prayers in public schools was found to violate the wall of separation between church and state. In each of these Justice Stewart dissented, but that is scarcely half of the story. In the First, *Engle v. Vitale*, the vote was six to one [44] with Justice Douglas writing a concurring opinion in addition to Justice Stewart's dissent. In his opinion, Justice Douglas emphasized that the point for decision was whether the Government could constitutionally finance a religious exercise. Although he found that "Our system at the federal and state levels is presently honeycombed with such financing" [45], he found invalid a New York law that required students to recite a prayer in the presence of a teacher at the start of each school day.

In the *Schempp* case [46], the second school prayer decision, the vote was eight to one, but it took four opinions for the nine Justices to dispose of the case. Justice Clark wrote the opinion of the Court, Justice Douglas wrote a concurring opinion [47] as did Justices Brennan [48] and Goldberg [49]. Justice Harlan joined Justice Goldberg's concurrence [50] and Justice Stewart wrote a dissenting opinion [51].

The gist of *Engle v. Vitale* and *Schempp* was perhaps best expressed by Justice Douglas when he wrote in his concurring opinion in the latter:

> But the Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way which gives any church, or all churches, greater strength in our society than it would have by relying on its members alone.[52]

To say the least, *Engle v. Vitale* and *Schempp* provoked a controversy that is likely to continue for quite some time [53].

40. 333 U.S. 203, 232.
41. *Ibid.*, 238.
42. 370 U.S. 421 (1962).
43. 374 U.S. 203 (1963).
44. Justices Frankfurter and White did not take part in the decision of the case.
45. 370 U.S. 421, 437. See in particular, footnotes 1-9 to Justice Douglas' opinion.
46. 374 U.S. 203 (1963).
47. *Ibid.*, 227.
48. *Ibid.*, 230.
49. *Ibid.*, 305.
50. *Ibid.*
51. *Ibid.*, 308.
52. *Ibid.*, 229.
53. See, for instance, the numerous amendments to the Constitution to permit prayers in the public schools that were proposed during the 88th Congress, 1st Session, as a result of *Engle v. Vitale* alone. In addition, see the numerous sermons, remarks, petitions, etc. printed in the *Congressional Record* for that session of the Congress of the United States.

Of all of the church and state cases, *Zorach v. Clauson* [54] is perhaps the most interesting. A six to three decision, it is interesting because of the line-up of the Justices as the Court upheld the New York "release time" law, so called. According to this law, upon the written request of parents, the state's public schools were permitted to release children during school hours so that they might leave school property to go to religious centers for religious instruction or devotional exercises. Justice Douglas wrote the opinion of the Court, but Justices Black [55], Frankfurter [56], and Jackson [57] each wrote dissenting opinions.

The case is equally interesting because of some of the language that Justice Douglas used to uphold the law. As he distinguished this case from *McCollum v. Board of Education* he wrote:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.[58]

Justice Black did not agree. To him, the plan, purpose, design and consequence of the New York release time law was "to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery [59]." To him, that violated the fundamental philosophy that he had expressed in the *Everson* [60] and the *McCollum* [61] cases. It violated the wall of separation.

Justice Jackson's reaction to the decision and the opinion of the Court was that "The wall which the Court was professing to erect between Church and State [in the *McCollum* case] has become even more warped and twisted than I expected [62]."

54. 343 U.S. 306 (1952).
55. 343 U.S. 306, 315.
56. *Ibid.*, 320.
57. *Ibid.*, 323.
58. *Ibid.*, 313, 314.
59. *Ibid.*, 318.
60. 330 U.S. 1 (1947).
61. 333 U.S. 203 (1948).
62. 343 U.S. 306, 325.

2.2. The Wall of Separation, the Loan of Books and the Provision of Auxiliary Services to Sectarian Schools: A Turning Point or a Crack in the Wall?

Perhaps *Board of Education of Central School District No. 1 v. Allen*[63], decided in 1968, can be considered the turning point in church and state cases that involve education. In that one, the Supreme Court upheld a New York law that authorized the free loan of textbooks to students in grades seven through twelve, whether they attended public or private (i.e., parochial) schools. The law was found not to be one "respecting an establishment of religion, or prohibiting the free exercise thereof" so as to conflict with the First and Fourteenth Amendments to the Constitution. To Justice White who wrote the opinion of the Court, there was no difference between the result achieved in this case with that achieved in *Everson*[64] twenty-one years earlier. In *Everson* the objective was to provide all children with free needed transportation to and from school, whether public or parochial; in the present case the objective was to provide *all* children with needed school books of a secular nature, regardless of the type of school they attended, whether public or parochial.

Possibly Justice Harlan best explained the decision of the Court, as well as predicted the course that the Court would soon follow in similar cases, when he wrote in his concurring opinion:

> I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly in the realm of the sectarian as to give rise to... divisive influences and inhibitions of freedom," ... it is not forbidden by the religious clauses of the First Amendment.[65]

Justices Black, Douglas, and Fortas did not agree. Justice Black considered the New York law "a flat, flagrant, open violation of the First and Fourteenth Amendments[66]." Justice Fortas considered that in deciding the case the Court ignored a vital aspect of it. To him, "despite the transparent camouflage that books [were] furnished to students, the reality [was] that they [were] selected and their use [was] prescribed by the sectarian authorities[67]." However, it was Justice Douglas who perhaps delivered the most telling blow by way of dissent when he wrote:

> Whatever may be said of *Everson*, there is nothing ideological about a bus. There is nothing ideological about a school lunch, or a public nurse, or a scholarship. The constitutionality of such public aid to students in parochial schools turns on

63. 392 U.S. 236 (1968).
64. *Everson v. Board of Education*, 330 U.S. 1 (1947).
65. 392 U.S. 236, 249.
66. *Ibid.*, p. 250.
67. *Ibid.*, 269, 270.

> considerations not present in this textbook case. The textbook goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed or faith. How can we possibly approve such state aid to a religion? A parochial school textbook may contain many, many more seeds of creed and dogma than a prayer. Yet we struck down in *Engel v. Vitale*, 370 U.S. 421, an official New York prayer for its public schools, even though it was not plainly denominational. For we emphasized the violence done the Establishment Clause when the power was given religious-political groups "to write their own prayers into law." *Id.*, at 427. That risk is compounded here by giving parochial schools the initiative in selecting the textbooks they desire to be furnished at public expense.[68]

The question of the loan to nonpublic elementary and secondary schools of books "acceptable for use in" public schools came up again in *Meek v. Pittenger*[69]. However, now there was added to this the loan of instructional materials and equipment useful to the education of nonpublic school children. This included guidance, counseling and testing services; psychological services; services for exceptional children, remedial and therapeutic services; speech and hearing services, services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, nonideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth[70].

The Court upheld the loan of books provision of the Pennsylvania statute but struck down everything else. There was an opinion of the Court, but once more the Justices went off in just about every different direction. Justice Stewart announced the judgment of the Court and delivered the opinion of the Court in all of which Justices Blackmun and Powell joined, and in all but Part III of which Justices Douglas, Brennan and Marshall joined[71]. Justice Brennan filed an opinion concurring in part and dissenting in part, in which Justices Douglas and Marshall joined[72]. Chief Justice Burger filed an opinion concurring in the judgment in part and dissenting in part[73]. Justice Rehnquist filed an opinion concurring in the judgment in part and dissenting in part in which Justice White joined[74].

The Court approved the use of its three-part test announced in its earlier decisions that the District Court had used, i.e., (1) the statute must have a

68. *Ibid.*, 254 at 257.
69. 421 U.S. 349 (1975).
70. See Acts 194, 195, Pa. Stat. Ann., Tit. 24, §9-972(a).
71. 421 U.S. 349, 351.
72. *Ibid.*, 373.
73. *Ibid.*, 385.
74. *Ibid.*, 387.

secular legislative purpose, (2) it must have a "primary effect" that neither advances nor inhibits religion, (3) the statute and its administration must avoid excessive government entanglement with religion [75]. But it rejected and left for another day the decision of the validity of the auxiliary services by simply stating:

> We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools, like the expenditure of state funds to support the basic educational program of those schools, necessarily result in the direct and substantial advancement of religious activity. For decisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained.[76]

The problems presented to the Court in *Meek v. Pittenger* were again before the Court in *Wolman v. Walter*, decided June 24, 1977 [77]. Again it was a question of a State (Ohio) providing nonpublic schoolchildren with books on a loan basis; supplying them with such standardized tests and scoring services as were used in public schools; speech and hearing diagnostic services and diagnostic psychological services, specialized attention therapeutic, guidance, and remedial services; instructional materials and instructional equipment of the kind used in the public schools that were incapable of diversion to religious purposes; and field trip transportation and services such as were provided public school students. There were safeguards in the statute so that the church-state issue might be avoided such as having nonpublic school personnel not involved in rendering the services.

As the Court faced the issues presented, it was divided more than ever with the Justices again going off in every direction. Justice Blackmun announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, V, VI, VII, and VIII [78], in which Justices Stewart and Stevens joined; in which as to Part I, Chief Justice Burger and Justices Brennan, Marshall, and Powell also joined; in which as to Part V Chief Justice Burger and Justices Marshall and Powell joined; and in which as to Part VI Chief Justice Burger and Justice Powell joined; in which as to Parts VII and VIII Justices Brennan and Marshall joined; and an opinion with respect to Parts II, III, and IV in which Chief Justice Burger and Justices Stewart and Powell joined. Chief Justice Burger dissented in part [79].

75. *Ibid.*, 358.
76. *Ibid.*, 369.
77. 433 U.S. 229 (1977).
78. *Ibid.*, 232.
79. *Ibid.*, 255.

Justices Brennan [80], Marshall [81], and Stevens [82] filed opinions concurring in part and dissenting in part. Justice Powell [83] filed an opinion concurring in part, concurring in the judgment in part and dissenting in part. Justices White and Rehnquist [84] filed a statement concurring in the judgment in part and dissenting in part.

After all was said and done, it was found constitutional for the State to provide nonpublic school pupils with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services. The parts of the statute that related to instructional materials and equipment and field trip services were found to be invalid. Once more the Court's three-pronged test was applied to the statute to separate the good from the bad. According to this test as Justice Blackmun stated it once more for the purposes of this case, "to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion [85]." But perhaps Justice Blackmun was a bit overoptimistic when he wrote:

> We have acknowledged before, and we do so again here, that the wall of separation that must be maintained between church and state "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S., at 614. Nonetheless, the Court's numerous precedents "have become firmly rooted," *Nyquist*, 413 U.S., at 761, and now provide substantial guidance.[86]

Indeed, perhaps Justice Stevens hit the nail more squarely on the head when he wrote even as he explained his agreement with parts of the decision of the Court:

> This Court's efforts to improve on the *Everson* test have not proved successful. "Corrosive precedents" have left us without firm principles on which to decide these cases. As this case demonstrates, the States have been encouraged to search for new ways to achieve forbidden ends. See *Committee for Public Education v. Nyquist*, 413 U.S. 756, 785, 797. What should be a "high and impregnable" wall between church and state, has been reduced to a "blurred, indistinct, and variable barrier," *ante* at 236.[87]

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80. *Ibid.*
81. *Ibid.*, 256.
82. *Ibid.*, 264.
83. *Ibid.*, 262.
84. *Ibid.*, 255.
85. *Ibid.*, 236.
86. *Ibid.*, 236.
87. *Ibid.*, 266. See also Justice STEVENS statement in *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 775 (1976) in which he wrote of "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it."

2.3. Sectarian Primary and Secondary Schools versus Sectarian Institutions of Higher Learning and the Wall of Separation

On June 28, 1971, the Supreme Court of the United States decided two more cases in the area of government aid to sectarian education. One, *Lemon v. Kurtzman, Superintendent of Public Instruction of Pennsylvania* [88], involved a Rhode Island salary supplement law that authorized the use of public funds to raise the salaries of nonpublic school teachers, and a Pennsylvania law that authorized the State Superintendent of Public Instruction to purchase certain secular educational services from nonpublic schools. The other, *Tilton v. Richardson, Secretary of Health, Education and Welfare* [89], involved the validity of the *Higher Education Facilities Act* of 1967 [90] which authorized federal grants and loans to institutions of higher education for the construction of "academic facilities." The Act expressly excluded "any facility used or to be used for sectarian instruction or as a place of religious worship, or... primarily in connection with any part of the program of a school or department of divinity." Moreover, the Act provided that the United States retained a 20-year interest in any facility constructed with funds under the Act, during which period violations of the statutory conditions would entitle the Government to the recovery of the funds.

In *Lemon*, a near unanimous, though somewhat fractured, Court struck down both the Rhode Island and the Pennsylvania statutes. Chief Justice Burger delivered the opinion of the Court in which Justices Black, Douglas, Harlan, Stewart, Marshall and Blackmun joined. However, Justice Douglas filed a concurring opinion in which Justices Black and Marshall joined, but with Justice Marshall filing a separate statement. Justice Brennan filed a concurring opinion; Justice White filed an opinion concurring in the Pennsylvania case but dissenting in the Rhode Island case.

In the course of the opinion of the Court, the contribution of church-related elementary and secondary schools in our national life was found to be enormous, but the programs involved were nevertheless said to be "something of an innovation [91]." Involvement or entanglement between government and religion was said to serve as a warning, as well as to constitute an independent evil "against which the Religion Clauses were intended to protect [92]."

88. 403 U.S. 602 (1971).
89. 403 U.S. 672 (1972).
90. 77 Stat. 364, as amended, 20 U.S.C. §§711-721.
91. 403 U.S. 602, 624.
92. *Ibid.*, 624, 625.

The outcome in *Tilton* was different. Government aid to church-related primary and secondary schools was said to be unlike government aid to church-related institutions of higher education. The former was found to be in violation of the First Amendment, but the latter was not, except that the 20-year limitation in the Act on the religious use of facilities constructed with federal funds was struck down. In arriving at this decision the Court was so divided that it could not agree on an opinion. Chief Justice Burger announced the judgment of the Court and delivered an opinion in which Justices Harlan, Stewart, and Blackmun joined [93]; Justice White filed an opinion concurring in the judgment [94]; Justice Douglas filed an opinion dissenting in part in which Justices Black and Marshall joined [95]; and Justice Brennan dissented [96].

In his opinion, Chief Justice Burger wrote that the difference between aid to primary and secondary schools on the one hand, and aid to institutions of higher learning on the other, was that in the case of the former aid was given to the education of impressionable children, whereas in the case of the latter religious indoctrination was not a substantial purpose or activity of the institutions involved. At the college level, the facilities aided were said to be religiously neutral and in need of less governmental surveillance.

Justice Brennan would have held the Higher Education Facilities Act unconstitutional "only insofar as it authorized grants of federal tax monies to sectarian institutions — institutions that have a purpose or function to propagate or advance a particular religion [97]."

Justice Douglas stated that he dissented "not because of any lack of respect for parochial schools but of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost [98]."

2.4. Voices in Dissent that Become the Majority View: A Deeper Crack or a Step Backward?

In *Committee for Public Education & Religious Liberty v. Nyquist* [99] and *Sloan, Treasurer of Pennsylvania v. Lemon* [100], both decided on June 25, 1973,

93. 403 U.S. 672, 674.
94. 403 U.S. 602, 661. (See p. 689 of the *Tilton* case).
95. 403 U.S. 672, 689.
96. 403 U.S. 602, 642. (See p. 689 of the *Tilton* case).
97. *Ibid.*, 661.
98. 403 U.S. 672, 689, 697.
99. 413 U.S. 756 (1973).
100. 413 U.S. 825 (1973).

the Court struck down support programs for religious-oriented nonpublic schools. In *Nyquist*, the New York Legislature had provided money grants to qualifying non-public schools for the maintenance and repair of facilities and equipment to ensure the student's health, welfare, and safety [101]. In *Sloan*, the Pennsylvania Legislature had enacted a Parent Reimbursement Act for Non-public Education [102] which provided funds for the reimbursement of parents for a portion of the tuition expenses incurred in sending their children to nonpublic schools.

In both cases, the laws were found to violate the Establishment Clause of the First Amendment. In each instance the effect of the plan was found to be to subsidize and advance the religious mission of sectarian schools, and this was not altered by the fact that the money went to the parents rather than directly to the schools. Nor did it help any in *Sloan* when it was argued that if parents of children who attend nonsectarian schools could receive assistance, then "parents of children who attend sectarian schools are entitled to the same aid as a matter of equal protection [103]." First, the Pennsylvania statute in question was found not to set up such a dichotomy between sectarian and nonsectarian schools; second, even if it had, valid aid to nonpublic, nonsectarian schools "would," Justice Powell wrote for the Court, "provide no lever for aid to their sectarian counterparts [104]." He continued: "The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution [105]."

2.4.1. Voices in Dissent

Nyquist and *Sloan* are important not only for what the Court decided, but also for what was said in dissent. In *Nyquist*, Chief Justice Burger [106], joined in part by Justice White and joined by Justice Rehnquist, concurred in part and dissented in part. Also, Justice Rehnquist [107], with whom the Chief Justice and Justice White concurred, dissented in part. Then, Justice White [108], joined in part by Chief Justice Burger and Justice Rehnquist, dissented. In *Sloan* the Chief Justice dissented for the reasons that he had given in *Nyquist*, as did Justice White [109].

101. New York Laws, 1972, c. 414, §1, amending the *New York Education Law*, Art. 12, §§549-553 (Supp. 1972-1973).
102. Penna. Laws 1971, Art. 92, Pa. Stat. Ann., Tit. 24, §§5701-5709 (Supp. 1973-1974).
103. 313 U.S. 825, 834.
104. *Ibid.*
105. *Ibid.*
106. 403 U.S. 756, 798.
107. *Ibid.*, 805.
108. *Ibid.*, 813.
109. 413 U.S. 825, 835.

The gist of Chief Justice Burger's thinking is perhaps best summarized when, citing *Everson v. Board of Education*[110], and *Board of Education v. Allen*[111], he wrote:

> While there is no straight line running through our decisions interpreting the Establishment and Free Exercise Clauses of the First Amendment, our cases do, it seems to me, lay down one solid, basic principle: that the Establishment Clause does not forbid governments, state or federal, to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that "aid" religious instruction or worship. Thus, in *Everson* the Court held that a New Jersey township could reimburse *all* parents of school-age children for bus fares paid in transporting their children to school. Mr. Justice Black's opinion for the Court stated that the New Jersey "legislation, as applied, does no more than provide a program to *help parents* get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S., at 18 (emphasis added).
>
> Twenty-one years later, in *Board of Education v. Allen, supra,* the Court again upheld a state program that provided for direct aid to parents of all schoolchildren including those in private schools. The statute there required "local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools [were] included." 392 U.S., at 238.[112]

Justice Rehnquist also relied on the *Everson* and the *Allen* cases, but he also centered his reasoning on the reasoning found in *Waltz v. Tax Comm'n*[113] in which Chief Justice Burger had written:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' *There is no genuine nexus between tax exemptions and establishment of religion.*" 397 U.S., at 675 (emphasis added).[114]

Justice White's reasoning was different. Once more citing his dissatisfaction with *Lemon v. Kurtzman* in which he had concurred in the judgment and dissented in part[115], he wrote of the Constitutional right of parents "to send their children to nonpublic schools, secular or sectarian, if those schools were sufficiently competent to educate the child in the necessary subjects[116]." To this he added, "A State should put no unnecessary obstacles in the way of religious training for the young. 'When the state encourages religious instruction... it follows the best of our traditions.'

110. 330 U.S. 1 (1947).
111. 392 U.S. 236 (1968).
112. 413 U.S. 756, 799.
113. 397 U.S. 664 (1970).
114. *Ibid.*, at 675 (emphasis added by Justice Rehnquist).
115. 403 U.S. 602, 661 (1971).
116. 413 U.S. 756, 814. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), cited by Justice White.

Zorach v. Clauson, 343 U.S., 306, 313-314 (1952); *Waltz v. Tax Comm'n*, 397 U.S. 664, 676 (1970)[117]." Then, citing the decrease in nonpublic school enrollment and the resulting substantial increase in public school budgets, he concluded:

> There are, then, the most profound reasons, in addition to those normally attending the question of the constitutionality of a state statute, for this Court to proceed with the utmost care in deciding these cases. It should not, absent a clear mandate in the Constitution, invalidate these New York and Pennsylvania statutes and thereby not only scuttle state efforts to hold off serious financial problems in their public schools but also make it more difficult, if not impossible, for parents to follow the dictates of their conscience and seek a religious as well as secular education for their children.

On the same day that the *Nyquist* and the *Sloan* cases were decided, the Court also decided *Levitt v. Committee for Public Education & Religious Liberty*[119]. In that case the Court again struck down a statute that was said to violate the wall of separation between Church and State. This time, the New York statute in question appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for the preparation, administration and reporting to state-mandated tests. The statute was considered invalid because it made no attempt, and there were no means available, to assure that tests prepared in church-related schools were free of religious instruction. Writing for the Court, Chief Justice Burger expressed the view of the majority that,

> We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church.[124]

However, he left the door ajar when he wrote that since the offensive statute provided only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither the Supreme Court nor the District Court could properly reduce that allotment to an amount "corresponding to the actual costs incurred in performing reimbursable secular services[121]." "That," he wrote, "is a legislative, not a judicial, function[122]."

Justices Douglas, Brennan and Marshall were of the view that affirmance of the lower court's decision striking down the statute was compelled

117. 413 U.S. 756, 814.
118. *Ibid.*, 819, 820.
119. 413 U.S. 472 (1973).
120. *Ibid.*, 480.
121. *Ibid.*, 482.
122. *Ibid.*

by the decision in *Nyquist* and that in *Lemon*[123]. However, Justice White dissented without stating his reasons in an opinion[124]. Apparently he was waiting for another day.

2.4.2. A Change of Position and the Dissenter Assumes Control

After *Levitt* in which the 1970 statute providing for the reimbursement of sectarian as well as other nonpublic schools for the expense of state-mandated tests was struck down, the New York Legislature went back to work and in 1974 it enacted another statute[125]. In this one it sought to cure what was said to be wrong with the earlier statute and yet produce the desired result. Like the earlier statute, this one appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for the expense of state-mandated tests. However, the later statute did not undertake to reimburse nonpublic schools for the preparation, administration, or grading of teacher-prepared tests. Moreover, it provided for the auditing of the payment of state funds so that only the cost of secular services would be reimbursed with state funds. Nevertheless, the validity of the 1974 statute was questioned as the earlier one had been. However, this time, in *Committee for Public Education and Religious Liberty v. Regan*[126], decided February 20, 1980, the statute was upheld, but not without vigorous dissent. Joined by Justices Brennan and Marshall, Justice Blackmun who had written the opinion of the Court in *Wolman v. Walker*[127] less than three years earlier wrote:

> The Court in this case, I fear, takes a long step backwards in the inevitable controversy that emerges when a state legislature continues to insist on providing public aid to parochial schools.[128]

Justice Stevens who had dissented in *Wolman* wrote:

> Rather than continuing with the sisyphean task of trying to patch together the "blurred, indistinct, and variable barrier" described in *Lemon v. Kurtzman*, 403 U.S. 602, 614, I would resurrect the "high and impregnable" wall between church and state constructed by the Framers of the First Amendment. See *Everson v. Board of Education*, 330 U.S. 1, 18.[129]

However strong Justices Blackmun and Stevens' dissents may have been, Justice White finally had his majority, though a slim one (5 to 4), with

123. *Ibid.*
124. *Ibid.*
125. New York Laws, 1974, ch. 507 as amended by chap. 508.
126. 100 S. Ct. 840 (1980).
127. 433 U.S. 229 (1977).
128. 100 S. Ct. 840, 851.
129. *Ibid.*, 855 at 856.

which to put over at least some of his views on the subject of public aid to church-related schools. But even as he did this he had to admit that neither this case, no more than past cases, would "furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools [130]." For, as he pointed out, "Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country [131]."

According to Justice White, under the precedents of the Court, "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principle or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion [132]." As he applied this three-pronged test that had been developed earlier, he agreed that *Wolman v. Walter* controlled the case, although he apparently did not see eye to eye with Justice Blackmun, the author of *Wolman*, with what that case had decided.

Although Justice White recognized that there were differences between the present case and *Wolman*, he did not consider these differences of constitutional dimension. As in *Wolman*, he found a clear secular purpose behind the legislation now before the Court to provide educational opportunity to prepare citizens for the challenge of American life in the last decades of the twentieth century. As in the earlier case, the tests were prepared by the State and administered on the premises by nonpublic school personnel. To him, here as in *Wolman*, the nonpublic schools controlled neither the content of the test nor its result, and thus prevented its use as part of religious teaching. As for the recordkeeping and the reporting of the results of the test, these were ministerial functions, not a part of the teaching process, and therefore could not be used to foster an ideological outlook.

The fact that the New York statute provided for direct cash reimbursement to nonpublic schools did not bother Justice White either. A contrary view would have meant drawing a constitutional distinction between paying nonpublic schools to grade tests and paying state employees or an independent service to perform the task. Concluded Justice White: "None of our cases requires us to invalidate these reimbursements simply because they involve payments in cash. The Court 'has not accepted the recurring argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.' *Hunt v. McNair*, 413 U.S. 734, 743 (1973) [133]."

130. *Ibid.*, 840 at 851.
131. *Ibid.*
132. *Ibid.*, 846.
133. *Ibid.*, 849.

The effect of Justice White's opinion for the majority of the Court was that *Meek v. Pittenger*[134] and *Wolman v. Walter*[135] had not, as Justice Blackmun thought, at last "fixed the line between that which is constitutionally appropriate aid and that which is not[136]." Indeed, some who had sought to set the line in these cases, as well as in *Lemon*[137] and *Levitt*[138], had defected to join Justice White to validate the statute in the present case, and this prompted Justice Blackmun to write:

> I am able to attribute this defection only to a concern about the continuing and emotional controversy and to a persuasion that a goodfaith attempt on the part of a state legislature is worth a nod of approval.[139]

But whether or not that is true, though *Committee for Public Education and Religious Liberty v. Regan*[140] is the most recent case on the separation of church and state to be decided by the Supreme Court of the United States, it certainly will not be the last. There will be others. Moreover, there will probably never be a single all-encompassing construction of the Establishment Clause of the First Amendment to the Constitution of the United States, as there never has been one to the Speech and Press Clause of the same Amendment.

Summary and conclusion

In Canada it is attempts to tamper with the protection given publicly supported sectarian education that has caused the problems; in the United States the problems have been caused by attempts to tamper with the prohibition against the use of public funds for the support of sectarian education. In every instance, whether in Canada or in the United States, it generally has been a question of interpretation. What exactly is protected by Article 93 of the *British North America Act*, or what exactly is the nature of the prohibition of the First Amendment to the Constitution of the United States with respect to denominational schools? How far does the protection given sectarian education in Canada extend, or how high and how impenetrable is the "wall of separation" between church and state in the United States? In Canada, the recent controversy over the secularization of the *Notre-Dame-des-Neiges* school is but the most recent case of that country's

134. 421 U.S. 349 (1975).
135. 433 U.S. 229 (1977).
136. 100 S. Ct. 840, 851.
137. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
138. *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973).
139. 100 S. Ct. at 852.
140. 100 S. Ct. 840 (1980).

long history of church-state relations with respect to education, as *Committee for Public Education and Religious Liberty v. Regan* is but the most recent case on the interpretation of the Establishment Clause of the First Amendment in the United States. There will be more such cases in both countries regardless of the wisdom of the courts that decide them.